IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 32 OF 2006.

Mrs. Alka Toraskar
Major of age, married,
r/o. FX 4, Moon Packers Apt.,
Altinho, Mapusa, Goa. ..... Petitioner/
Ori. Accused

V e r s u s

1. The Vaishya Urban Co-op
Credit Society Ltd.
Mapusa, Goa.
Represented through their
representative Mr. Gaurish P. Shirodkar,
major of age, resident
of Mapusa, Bardez, Goa. ..... Respondent no.1/
Ori. Complainant

2. State of Goa. ..... Respondent no.2.

Ms. E. Fernandes, Advocate for the Petitioner.

Mr. G. Kanekar, Advocate for Respondent no.1.

CORAM: N. A. BRITTO, J.

DATE: 4th October, 2006.

ORAL JUDGMENT

The petitioner herein is accused in C.C. no. 805/P/2004/C and questions the correctness of the Judgment dated 03.07.2006 of the learned Assistant Sessions Judge, Mapusa, upholding the conviction and sentence imposed

upon the accused under Section 138 of the Negotiable Instruments Act, 1881, ('*Act*' for short).

2. The parties hereto are being referred to the names as they appear in the cause title of the complaint

3. The Complainant is a Co-operative Credit Society registered under the Maharashtra Society Co-operatives Act, 1960, as applicable to this State. The accused had obtained a loan of Rs.2,50,000/- from the Complainant and as per the Complainant, the accused had issued a cheque bearing no. 449031, dated 20.02.2004, for Rs.1,48,775/-, drawn on Andhra Bank, Mapusa, towards part payment of the said loan amount and when the said cheque was presented for payment, it was returned dishonoured for insufficient funds vide endorsement dated 23.02.2004 whereupon the Complainant by registered notice dated 01.03.2004, called upon the accused to pay the said amount due on the said cheque within 15 days from the date of the receipt of the notice. As per the Complainant, the said notice was received by the accused on or about 07.03.2004, but the accused had failed and neglected to pay the said amount within the stipulated time and, therefore, the Complainant had filed the complaint against the accused.

4. The case of the accused was that the said cheque was given by the

accused to the Complainant Bank as security and it was not issued in discharge of any debt.

5. Three submissions have been made on behalf of the accused, by learned Counsel Ms. P. Fernandes.

6. The first is that the demand notice was not received by the accused on 07.03.2004, as on that date, the accused had proceeded to Mumbai. In support of the said plea that the accused was unavailable, the accused had examined D.w.1, whose evidence as per the learned Counsel had remained unscathed. There is no dispute that in the case at hand, the legal notice sent by the Complainant to the accused was produced at exhibit P.w.1/G along with AD card which showed that the accused had received the said notice. The accused herself had not stepped into the witness box, either to deny that the signature that appear on the said AD card was not hers nor had led any other evidence to show that the same was not received by her. The learned J.M.F.C. observed, and in my view rightly, that the address on the notice was not disputed by the accused. Relying on the case of ***Mohammad Ali v. State of Goa (2006 ALL M.R. (Cri.) page 34)***, the learned J.M.F.C. noted that once notice was issued at the correct address, it was not necessary for the Complainant to prove the signature on the A.D. Card. The learned J.M.F.C. did not rely on the deposition of D.w.1 in support of the fact that

the accused could not have received the said notice as the accused had proceeded to Bombay. In the case at hand, not only the notice was addressed to the correct address of the accused but was also returned as received by the accused and the accused herself had chosen not to step into the witness box to rebut the presumption which was available to the Complainant by virtue of Section 27 of the General Clauses Act, 1887. The statutory presumption was clearly in favour of the Complainant that the accused had received the said notice, which presumption the accused had failed to rebut and, therefore, the conclusion that the notice was received by the accused, could not be faulted.

7. The second submission made on behalf of the accused is that on the date when the cheque was given, only an amount of Rs.46,773/- was due and payable by the accused. The evidence produced by the Complainant shows that the Complainant had also obtained an Award against the accused for payment of the sum of Rs. 2,59,855/- with interest at the rate of 18% per annum, against which, the accused had preferred an appeal which was pending before the Co-operative Tribunal. The Complainant's witness had also stated that the accused had deposited only a sum of Rs.32,844/- in the Bank, towards the loan amount and moreover the Complainant's witness had also produced the Statement of Account, which clearly showed that as on the date of the issue of the cheque for Rs.1,48,775/-, the amount due and payable by the accused as on 1st April, 2004,

was Rs.2,48,875/-, which was more than the amount of the cheque. The learned J.M.F.C. appears to have relied upon the said Statement of Accounts produced on record on behalf of the Complainant in preference to a stray statement made by the Complainant's witness that the amount due by the accused was only Rs.46,773/-. In the circumstances, the conclusion arrived at by the learned J.M.F.C., on that count also, could not be faulted.

8. The third submission of the learned Counsel on behalf of the accused is that Shri Gaurish P. Shirodkar, who was examined on behalf of the Complainant, was not duly authorized either to lodge the complaint or to give evidence in support of the complaint. It is submitted that the authority letter produced by the Complainant's said witness Gaurish P. Shirodkar, who was stated to be a Recovery Officer of the Complainant-Co-operative Credit Society, was for the purpose of attending the Court cases only and, therefore, it could not be taken as sufficient authority either to file a complaint or to depose in support thereof. The learned Counsel has placed reliance on the case of ***M/s. Swastik Coaters Pvt. Ltd v. M/s. Deepak Brothers & Ors. (1997 CRI. L.J. 1942)***.

9. On the other hand, the learned Counsel on behalf of the Complainant has submitted that no specific authority was required to be produced for the said Gaurish P. Shirodkar, either to file the complaint or to depose in support thereof as

he was the Recovery Officer of the Complainant-Co-operative Society and in support of the said submission, learned Counsel has placed reliance on the case of ***Geekay Exim (India) Ltd. & Ors. v. State of Gujarat (1998 Cr. L. J. 700)***.

10. In the case of ***M/s. Swastik Coaters Pvt. Ltd v. M/s. Deepak Brothers & Ors*** (supra), the drawee of the cheque was a Company and it was the Company who was the holder in due course and it was stated that the cause of action arose necessarily in favour of the Company. A Director of the Company could not be said to be a holder in due course since the Company by itself was a legal person. One of the Directors can present a complaint if there was a proper authorisation in favour of such a Director and since no authorisation or any resolution was filed in that case, authorising the said Director to institute the proceedings, the complaint could not have been maintained under Section 142 of the Negotiable Instruments Act.

11. In the case of ***Geekay Exim (India) Ltd. & Ors. v. State of Gujarat (***supra), it was observed that:

> "10 – An identical question arose for consideration before the Madras High Court in the case of Sagayadurai v. J. D. Electronics reported in 1997 (2) Crimes 115 wherein the Court held that, in case of a

firm, Manager is authorised to sign documents, agreements, therefore the complaint filed by the Manager on behalf of the firm is legal and valid and it cannot be stated that the Manager representing the Company shall obtain a special permission or authorisation from the Company and file it along with the complaint. While dealing with the scope of Section 138 of the Act and competency of a person to file complaint, it is held by Madras High Court in the case of Sudesh Kumar Sharma v. K. S. Selvamani reported in (1994) 4 Cur Cri R 2374, that a complainant must necessarily by a payee or holder in due course and if the complaint is filed by Manager in his personal capacity, then authorisation is required. In that case, the complaint was not filed in the name of legal entity but in the name of Manager representing the interests of legal entity. Since Manager who filed the complaint was not the payee or holder in due course, the Court held that authorisation is necessary. In the case of Ruby Leather Exports v. V. K. Venu Rep. Vandana Chemicals reported in 1993 Madras Weekly Notes 249, it has been held that a power of attorney, agent or a person authorised in writing by the payee or the holder in due course of a cheque is a competent person to make a complaint in writing under Section 142 of the Act. On facts, it was held that, as prosecution was initiated by the Complainant in his personal name for and on behalf of the corporate body and not in the

> name of Company, authorisation was required and ought to have been produced before the Court before taking cognizance. As no such authorisation was produced before taking cognizance, the complaint was held as barred under Section 142 of the Act and required to be quashed."

12. There is no dispute that the accused had issued the subject cheque to the Complainant which is a registered Co-operative Credit Society, registered under the Maharashtra Societies Co-operative Act, 1960, as applicable to the State of Goa. The cause title also shows that the complaint was filed by the said Society. On behalf of the Complainant, Resolution no.20 was produced as exhibit 20. It reads as follows:

> "It was resolved to authorise Mr. Gaurish P. Shirodkar, Officer-in-charge for Recovery, to attend any Court/ABN cases on behalf of our Society against defaulters and our loanee members."

When the Complainant's witness the said Shirodkar was cross examined on the said Resolution/Authority letter, the Complainant's witness admitted that the said Resolution authorised him to attend Court cases and not to depose on oath. It is contented by learned Counsel on behalf of the accused that this point was raised

before both the Courts below. The learned J.M.F.C., merely observed that the Complainant produced on record true extract of the Resolution authorising Gaurish Shirodkar to attend the Court on behalf of the Society. There is no whisper about the said Resolution/Letter of Authority in the Judgment of the learned Appellate Court, which otherwise also is very cryptic. The said Resolution did not authorise the said Gaurish P. Shirodkar, the recovery officer of the Complainant-Co-operative Society, either to file a complaint on behalf of the Complainant, which is a separate legal entity or to depose in support of the Complainant. A complaint under Section 142 of the Act can be filed either by the payee or the holder in due course. The Complainant-Co-operative Society was the payee in this case and the complaint was filed in its name. The authority produced did not sufficiently authorise Shri G.P. Shirodkar either to file the complaint or to depose in support thereof. The Complainant was not sufficiently represented before the Court. Therefore, it could not be said that the complaint filed or the evidence given in support thereof was in accordance with Section 142 of the Act, which requires that the complaint has to be made by the payee or, as the case may be, by the holder in due course of the cheque. In the absence of any Power of Attorney or a valid authority by the Complainant in favour of the said Recovery Officer, the complaint itself could not have been entertained and conviction based on such a complaint, is liable to be set aside.

13. Consequently, the Criminal Revision Application deserves to succeed. The Judgments of both the Courts below are hereby set aside. Consequently, the accused shall be acquitted under Section 138 of the Act.

N. A. BRITTO, J.

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